

Earthjustice
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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Center for Biological Diversity Plaintiff/Petitioner(s) VS. California Department of Conservation Defendant/Respondent(s) (Abbreviated Title)	No. <u>RG15769302</u> Order Demurrer to Complaint Overruled
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The Demurrer to Complaint filed for California Department of Conservation, Division of Oil, Gas, and Geothermal Resources was set for hearing on 09/30/2015 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The demurrer of respondent California Department of Conservation, Division of Oil, Gas and Geothermal Resources (the "Department" and "DOGGR," respectively) to second cause of action is **OVERRULED**, for the reasons set forth below.

This case concerns Class II well operations (associated with oil and gas production, including wells used for enhanced oil recovery, disposal of produced water and other specified oilfield wastes, and underground storage of hydrocarbons), which are regulated under California's Underground Injection Control program (the "UIC Program"). That program exists pursuant to a grant of "primacy" to the State of California by the Environmental Protection Agency (EPA), which would otherwise have exclusive authority to oversee and enforce the federal Safe Drinking Water Act (SDWA) in California. Instead, the EPA has approved the State's UIC program (consisting of state law) to regulate underground injections, and the Department/DOGGR to ensure compliance. The Complaint and judicially-noticed materials suggest that the grant of primacy remains in place and do not state that the EPA has taken any steps to rescind or modify that grant of primacy.

The second cause of action (writ of mandate under CCP § 1085) alleges that the Department (through its division, DOGGR) has violated both non-discretionary and discretionary duties by failing to "strictly follow state and federal law requirements" to protect California's non-exempt aquifers from contamination and harm. (See Compl. ¶¶ 92-94, 96.) Petitioners/Plaintiffs Center for Biological Diversity et al. ("Petitioners") emphasized at the hearing that they are pursuing five different theories of liability under section 1085. To avoid demurrer, they need only demonstrate that they have adequately pleaded facts that would support one of these theories. (Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1046-47.)

Defendants have identified several provisions of the California Public Resources Code that grant DOGGR discretion in regulating oil and gas injection wells, requiring the application of wisdom and judgment to determine what actions are necessary to protect the environment, including water supplies.

Order

(See Public Resources Code §§ 3106, 3224, 3226.) However, as Petitioners stated in their papers and reiterated at the hearing, the UIC Program that DOGGR is tasked with administering expressly includes the Memorandum of Agreement ("MOA") entered into by DOGGR and the EPA, pursuant to the grant of primacy. (See 40 CFR § 147.250(b).) That MOA prohibits the issuance of a Class II permit for injection wells into an aquifer unless there is an aquifer exemption in place. (See DOGGR RJN Ex. 1 at p. 6-7.) Petitioners allege that DOGGR admits that it has "improperly approved" injections into non-exempt aquifers, and that the hearing stated that DOGGR has issued permits into non-exempt aquifers and, through the issuance of the emergency regulations, intends to continue doing so through 2017. DOGGR's reply brief wholly failed to address this argument or these allegations. Thus, Plaintiffs have alleged prima facie facts that DOGGR has either violated a mandatory duty, acted in excess of the powers conferred upon it, and/or acted arbitrarily and capriciously in exercising its discretionary duties under the UIC Program. (See, e.g., *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 [where state law requires imposition of specific conditions for issuance of a license, agency has mandatory duty to attach the conditions to such licenses; agency's actions constituted unreasonable delay in complying with court order].)

The court does not decide, at this stage, whether this duty is mandatory or discretionary. If mandatory, however, DOGGR has not identified any legal basis to disregard its apparent obligation under the MOA, incorporated in the approved UIC Program through section 145.250 of the CFR, to refrain from issuing permits absent an exemption. (Id. at 202-03 ["An administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands."]) If discretionary, and permits are evaluated individually or in groups (based upon similar factors), Petitioners may be able to demonstrate that the issuance of one or more permits was arbitrary and capricious, and that reasonable minds could not differ on how DOGGR should exercise its discretion in those instances. However, to the extent that Petitioners challenge the emergency regulations or DOGGR's failure to issue individual shut down orders, the case begins to look more like a challenge to the effectiveness with which DOGGR administers the UIC Program (see *AIDS Healthcare Found. v. Los Angeles Cnty. Dep't of Pub. Health* (2011) 197 Cal.App.4th 693, 704), or a challenge to prosecutorial discretion (*Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 598), and may implicate separation of powers issues (see *California Corr. Supervisors Org., Inc. v. Dep't of Corr.* (2002) 96 Cal.App.4th 824, 831-32).

Because Petitioners have pleaded at least one viable theory to support this cause of action, the demurrer is **OVERRULED**. Respondents shall have 20 days to answer (plus 5 extra days for service by mail under C.C.P. § 1013), which time shall run from the date on the Clerk's certificate of mailing of this Order.

Dated: 10/05/2015

 facsimile

Judge George C. Hernandez, Jr.

SHORT TITLE: Center for Biological Diversi VS California Department of Con	CASE NUMBER: RG15769302
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Order After Hearing Re: of 10/05/2015

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 10/05/2015.

Chad Finke Executive Officer / Clerk of the Superior Court

By

A handwritten signature in black ink, appearing to read "Humbesley", is written over a horizontal line. Below the signature, the word "digital" is printed in a small font.

Deputy Clerk